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In the

Supreme Court of the United States

October Term, 1998

ELOISE ANDERSON, Director, California Department of Social Services; CALIFORNIA DEPARTMENT OF SOCIAL SERVICES; PETE WILSON, Governor of the State of California; and CRAIG L. BROWN, Director, California Department of Finance,

Petitioners,

v.

BRENDA ROE and ANNA DOE, on behalf of themselves and all others similarly situated,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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IDENTITY AND INTERESTS OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in Support of Petitioners Eloise Anderson, *et al.*[1] Written consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.

Pacific Legal Foundation is submitting this brief because it believes its public policy perspective and litigation experience in the welfare reform arena will provide an additional viewpoint with respect to the issues presented. PLF has participated in numerous cases before this Court, including the previous incarnation of this case, *Anderson v. Green*, 513 U.S. 922 (1994), as well as other welfare reform cases such as *Lascaris v. Shirley*, 420 U.S. 730 (1975), and *Geduldig v. Aiello*, 417 U.S. 484 (1974).

PLF believes that the welfare reform act of 1996, officially titled the "Personal Responsibility and Work Opportunity Reconciliation Act of 1996," has essentially wiped the welfare slate clean. After more than 60 years of tinkering with a welfare system that has proven to be counterproductive and beyond repair, the federal welfare act states that its purpose is to increase flexibility of states in operating a program designed to, among other things, end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage. 42 U.S.C. § 601(a)(2). The federal welfare reform act allows the states to conduct novel social and economic experiments. California's statutory provision restricting welfare

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

benefit levels distributed to new residents during their first year of arrival in a state to the amount received in their state of origin is such an experiment. It is part of California's experimental project to end welfare dependency. In deference to the principles of federalism, California's experiment should be allowed to continue.

SUMMARY OF ARGUMENT

The welfare reform act of 1996, expressly provides block grants to states in order to encourage state innovation. Instead of an open-ended system encouraging welfare as a way of life, the Act states that its purpose is to increase the flexibility of states in operating a program designed to, among other things, end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage. California responded to this congressional change of direction by implementing various provisions including California Welfare and Institutions Code § 11450.03. Section 11450.03 generally provides new residents the same amount of welfare benefits that they were eligible to receive before moving to California. Out of deference to principles of federalism and in recognition that states should be allowed a certain amount of freedom to conduct novel social experiments, California's efforts to transform its broken welfare system by maintaining newcomers at the same amount of welfare benefits they were eligible to receive in their former state of residence for 12 months should be allowed to continue.

The proper standard of review of Section 11450.03 should be the traditional, rational basis equal protection test. Under this analysis, legislatures must be free to do their work, which at times requires drawing distinctions between individuals. The role of the courts is generally a deferential one where courts do not second-guess the wisdom or efficacy of legislative action, but merely seek to ensure its rationality. This Court should rule that in the interest of discouraging welfare dependency, states

should be allowed to experiment with different benefit levels, while at the same time providing a safety net for residents, without regard to the duration of their residency.

The Ninth Circuit and the trial court relied upon *Shapiro v. Thompson*, 394 U.S. 618 (1969), and *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974), in holding that Section 11450.03 is subject to strict scrutiny analysis based on their finding that the statute imposes a penalty on the right to travel and the state failed to show a compelling state purpose. *Roe v. Anderson*, 134 F.3d 1400, 1404 (9th Cir. 1998). Yet, the equal protection analysis of *Shapiro* and *Memorial Hospital* need not, and should not, control the outcome of this litigation. The analysis of *Shapiro* has lost its vitality over time and should not be applied. This Court has applied a variety of different analyses to right to travel issues, thus undermining the controlling precedential effect of any one line of analysis. *Shapiro* was based on a strict scrutiny, equal protection analysis. *Memorial Hospital* emphasized the concept of a "penalty" in the strict scrutiny analysis. *Sosna v. Iowa*, 419 U.S. 393, 419 (1975), applied an "ad hoc balancing test." *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985), and *Zobel v. Williams*, 457 U.S. 55 (1982), were decided under a rational basis review. Justice O'Connor has twice advocated a two-pronged test based on the Privileges and Immunities Clause of Article IV of the Constitution. *Zobel*, 457 U.S. at 71-81 (O'Connor, J., concurring in the judgment); *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986) (O'Connor, J., dissenting). Other cases have held that welfare legislation is ordinarily subjected to rational basis review. *Dandridge v. Williams*, 397 U.S. 471 (1970); *Jefferson v. Hackney*, 406 U.S. 535 (1972). Unlike *Shapiro* and its progeny, Section 11450.03 does not impose an absolute bar to the receipt of benefits by recent migrants. Instead, only minimal delay in receiving an *increase* in benefits is imposed. *Shapiro* and its progeny need not, and should not, control the outcome of this litigation.

STATEMENT OF THE FACTS

In 1996, Congress fundamentally changed the nature of the American welfare system by repealing, among other things, the Aid to Families with Dependent Children program and replacing it with the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. § 601, *et seq*. ThisAct gives states broad authority to design and implement their own welfare systems. In doing so, Congress aimed to increase the flexibility of the states to experiment with their welfare systems, with the ultimate goal of encouraging recipients to find work and end dependence on welfare. *See* 42 U.S.C. § 601.

Among its provisions, the federal welfare reform act changed the basic funding format. Funding for a state's welfare program is provided through block grants to states with certified Temporary Assistance to Needy Families (TANF) plans. In addition, the federal welfare reform act expressly authorizes states to limit welfare benefits to new residents to the amount that such persons received in their prior state of residence for up to 12 months after relocation. 42 U.S.C. § 604(c).

Following this congressional change in direction, California resurrected Welfare and Institutions Code § 11450.03.[2] This statute provides that newcomers to California would receive the same level of welfare benefits for 12 months that they were eligible to receive in their former state. Section 11450.03 provides:

[2] Welfare and Institutions Code § 11450.03 was the subject of previous litigation prior to enactment of the federal welfare reform act. The federal district court and Ninth Circuit Court of Appeals struck down the statute as violating the right to travel (*Green v. Anderson*, 26 F.3d 95 (9th Cir. 1994)), and this Court granted review of the case. However, the case was dismissed and the judgment of the Ninth Circuit vacated when the federal waiver was withdrawn. *Anderson v. Green*, 513 U.S. 557, 560 (1995).

> (a) Notwithstanding the maximum aid payments specified in paragraph (1) of subdivision (a) of Section 11450, families that have resided in this state for less than 12 months shall be paid an amount calculated in accordance with paragraph (1) of subdivision (a) of Section 11450, not to exceed the maximum aid payment that would have been received by that family from the state of prior residence.

Two applicants for California welfare benefits, representing a certified class of all new residents to California, challenged this statute as violating the right to travel under the United States Constitution. *Roe v. Anderson*, 134 F.3d at 1403. The applicants remained *eligible* to receive welfare benefits, but California, in adopting Section 11450.03, made the decision not to *increase* newcomers' benefit levels. Instead, new California residents receive, for one year, the same amount of welfare benefits they received in their state of prior residence. *Id.* The district court, relying on its previous ruling in *Green v. Anderson*, granted the preliminary injunction based on a finding that Section 11450.03 penalizes the right to travel. *Roe v. Anderson*, 966 F. Supp. 977 (E.D. Cal. 1997).

The Ninth Circuit affirmed the lower court ruling. Relying on *Shapiro*, the Ninth Circuit ruled that Section 11450.03 places a penalty on the right to travel and that the state failed to show a compelling state purpose. *Roe*, 134 F.3d at 1404.

ARGUMENT

I

CALIFORNIA SHOULD BE ALLOWED TO CONDUCT ITS NOVEL EXPERIMENT

The welfare reform act of 1996 makes major changes in the administration of welfare. Instead of a federally micro-managed system required to be nationally uniform, the federal welfare reform act now provides block grants to the states in order to encourage state innovation. Instead of an open-ended system

encouraging welfare as a way of life, the Act states that its purpose is to increase the flexibility of states in operating a program designed to, among other things, end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage. 42 U.S.C. § 601(a)(2). This change of direction allows the states to conduct novel social and economic experiments.

In response to this new grant of state flexibility in the field of welfare reform, California began its experimental project to reform welfare dependency and, among other things, implement the provisions of Section 11450.03. Section 11450.03 generally provides new residents the same amount of welfare benefits that they were eligible to receive before moving to California.

In ruling on the validity of this state statute, this Court should be mindful of the concept of federalism. The United States is composed of sovereign units of government entitled to a certain amount of latitude in order to experiment with novel solutions to social and political problems. The idea that federalism allows the states to conduct novel social and economic experiments, was first expressed by Justice Brandeis. His eloquent statement on this subject bears repeating:

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. . . . But in the exercise of this high power, we must be ever on our guard lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.

New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandies, J., dissenting). *Accord, San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 49-50 (1973); *United States v. Lopez*, 514 U.S. 549 (1995) (Kennedy, J., concurring) ("In this circumstance, the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.").

Indeed, Justice Harlan recognized the need to allow states to conduct novel social and economic experiments in the area of welfare reform.

> [T]he field of welfare assistance is one in which there is a widely recognized need for fresh solutions and consequently for experimentation. Invalidation of welfare residence requirements might have the unfortunate consequence of discouraging the Federal and State Governments from establishing unusually generous welfare programs in particular areas on an experimental basis, because of fears that the program would cause an influx of persons seeking higher welfare payments.

Shapiro, 394 U.S. at 674-75 (Harlan, J., dissenting).

After more than 60 years of tinkering with a welfare system that has proven to be counterproductive and beyond repair, Congress has given the states the opportunity for a fresh start by adopting the welfare reform act. In so doing, President Clinton announced that

> this legislation provides an historic opportunity to end welfare as we know it and transform our broken welfare system by promoting the fundamental values of work, responsibility, and family.

1996 WL 648450 (Leg. Hist.).

California embraced the congressional mandate for state innovation in the field of welfare reform. In an effort to transform a broken system that traps too many people in a cycle of dependence to one that emphasizes work and independence, California developed an experimental project including Section 11450.03.[3]

Unfortunately, California's experiment in the field of welfare reform has been placed on hold. This Court should rule that in the interest of discouraging welfare dependency, states should be allowed to experiment with different benefit levels while at the same time providing a safety net for residents, without regard to the duration of their residency.

II

SECTION 11450.03 SHOULD BE UPHELD UNDER RATIONAL BASIS REVIEW

A. Welfare Legislation Is Subject to Rational Basis Review

California's residency-based benefit level statute easily passes rational basis review under the Equal Protection Clause. The Equal Protection Clause of the Fourteenth Amendment, Section 1, commands that no state shall "deny to any person within its jurisdiction the equal protection of the laws."

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[3] Maintaining newcomers at the same amount of welfare benefits they were eligible to receive in their former state for 12 months would also reduce overall welfare expenditures. Declaration of Dennis Hordyk attached to the Declaration of Theodore Garelis, Petition for Writ of Certiorari, Appendix (App.) 44. In fiscal year 1995-96, California provided $6 billion in public welfare assistance. Although it has only 12% of the nation's population, California accounts for 29% of all money spent nationwide on public welfare assistance, and its monthly average caseload of 2,645,814 persons is 20% of the national public welfare assistance caseload. Wagstaff Declaration at App. 26.

Controlling precedent from this Court holds that statutes involving public welfare assistance are subject to rational basis review.

Dandridge v. Williams, 397 U.S. 471, addressed an equal protection challenge to a Maryland state statute that limited public welfare assistance to families. The Court established the following test:

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." . . . "The problems of government are practical ones and may justify, if they do not require, rough accommodations--illogical, it may be, and unscientific." "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

Id. at 485 (citations omitted). The Court recognized that public assistance programs may give rise to inequalities in their design and administration. Nonetheless, the Court ruled:

> But the Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all. It is enough that the State's action be rationally based and free from invidious discrimination.

Id. at 486-87 (citations omitted). In upholding the state welfare scheme, the Court explicitly stated it was not ruling that the Maryland policy before it was wise or best fulfilled the relevant social and economic objectives the state might ideally espouse, nor that it was the most humane and just system that could be devised.

> But the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court. The Constitution may impose certain procedural safeguards upon systems of welfare administration. But the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients.

Id. at 487 (citations omitted).

In *Jefferson v. Hackney*, 406 U.S. 535, the Texas policy of providing a lower percentage of the state's total pool of welfare benefits to families with dependent children than was provided to aged, blind, or disabled adult recipients was attacked as violating the Equal Protection Clause. Applying traditional rational basis analysis, the Court held the disparities were neither irrational nor invidious. *See id.* at 547. This Court ruled that state legislatures are permitted to address an issue one step at a time without necessarily running afoul of the Constitution:

> [T]he legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional straitjacket. The very complexity of the problems suggests that there will be more than one constitutionally permissible method of solving them.

Id. at 546-47 (citation omitted). This Court in *Jefferson* specifically addressed the question of providing a lower percentage of payment to certain classes of recipients.

> Since budgetary constraints do not allow the payment of the full standard of need for all welfare recipients, the State may have concluded that the aged and infirm are the least able of the categorical grant recipients to bear the hardships of an inadequate standard of living. While different policy judgments

> are of course possible, it is not irrational for the State to believe that the young are more adaptable than the sick and elderly . . . . Whether or not one agrees with this state determination, there is nothing in the Constitution that forbids it.

Id. at 549.

By analogy, it is not irrational to believe that welfare dependence will be reduced if California stops serving as a "welfare magnet," attracting indigent migrants from states with lower benefit levels. Nor is it irrational to believe that new residents are not disadvantaged by receiving the same amount of public welfare assistance as they received in their original state of residence (as well as additional California benefits that may or may not have had counterparts in the original state). *See* Wagstaff Declaration at App. 38 (new residents may be eligible for a Special Needs Allowance for homeless assistance, full Medicaid benefits, and food stamps).

B. Section 11450.03 Passes Rational Basis Review

Departing from the precedent this Court established in *Dandridge* and *Jefferson*, the Ninth Circuit and the trial court relied upon *Shapiro* and its progeny in holding that Section 11450.03 should be subject to strict scrutiny analysis. *Roe*, 134 F.3d at 1404. In *Shapiro*, this Court held that legislation which denied welfare benefits outright to new state residents of less than one-year duration was constitutionally impermissible because, such legislation "touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a compelling state interest." *Shapiro*, 304 U.S. at 638. The Court determined that the complete denial of welfare assistance for a full year penalized the plaintiffs' right of interstate movement. *Id.* at 364. By contrast, however, Section 11450.03 imposes no absolute bar to the receipt of benefits by recent migrants. Instead, only

minimal delay in receiving an *increase* in benefits is imposed. Additionally, Section 11450.03 is rationally related to furthering the state's legitimate interest in ensuring that the state's limited public assistance resources are distributed as equitably as possible.

Whether Section 11450.03 constitutes a wise welfare policy is a decision the United States Congress has given to the states. The role of the courts is generally a deferential one where courts do not second-guess the wisdom or efficacy of the legislative action, but merely seeks to ensure its rationality. This Court should rule that in the interest of discouraging welfare dependency, states should be allowed to experiment with different benefit levels while at the same time providing a safety net for residents, without regard to the duration of their residency. Section 11450.03 should be upheld.

III

SHAPIRO AND ITS PROGENY ARE NOT CONTROLLING IN THIS CASE BECAUSE NO FUNDAMENTAL RIGHT IS BURDENED BY A LAW THAT LEAVES MIGRANTS EQUALLY WELL OFF AS IF THEY HAD REMAINED IN THEIR PRIOR STATE OF RESIDENCE

A. The Law at Issue Does Not Impose an Eligibility Bar to New Migrants

Shapiro v. Thompson is the hook on which the court below hung its hat. *Roe*, 134 F.3d at 1404. *Shapiro* invalidated a one-year residency requirement imposed before *any* welfare benefits could be collected. Applying strict scrutiny, the Court found no compelling state interest capable of justifying the requirement. *Shapiro*, 394 U.S. at 641. The Court held that requiring new residents to wait one year before receiving *any* welfare benefits constituted invidious discrimination between new and longtime residents, and that if a law had no other purpose than chilling the

exercise of a constitutional right such as that of migration of needy persons into the state, the law was impermissible. *Id.* at 627, 631. Further,

> any classification which serves to penalize the exercise of [the right of migration], unless shown to be necessary to promote a *compelling* government interest, is unconstitutional.

Id. at 634 (emphasis added). The Court held that constitutional concepts require that all citizens

> be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.

Id. at 629.

Yet, the Court did not analyze the statutes at issue in the light of an "unreasonable burden or restriction." Rather, it invoked the usually fatal strict scrutiny and found the state's reasons noncompelling. Justice Harlan, in his *Shapiro* dissent, identified the problems with this analysis. Because "[v]irtually every state statute affects important rights," the fundamental rights strand of equal protection doctrine "creates an exception which threatens to swallow the standard equal protection rule." 394 U.S. at 661 (Harlan, J., dissenting). Justice Harlan continues:

> When the right affected is one assured by the Federal Constitution, any infringement can be dealt with under the Due Process Clause. But when a statute affects only matters not mentioned in the Federal Constitution and is not arbitrary or irrational, I must reiterate that I know of nothing which entitled this Court to pick out particular human activities, characterize them as "fundamental," and give them

> added protection under an unusually stringent equal protection test.

Id. at 662.

Despite *Shapiro's* logical and textual failings, the Court directly applied its rationale in two subsequent cases. In *Dunn v. Blumstein*, 405 U.S. 330, 342 (1972), a waiting period requirement for voting was struck down because "such laws force a person who wishes to travel and change residences to choose between travel and the basic right to vote." The question arose as an equal protection issue. The Court found that a law requiring one year of state residence and three months of county residence before an individual could register to vote *penalized* the exercise of the right to travel by temporarily depriving persons who moved across state lines of their right to vote. *Dunn*, 405 U.S. at 342. *Dunn*, too, emphasized strict scrutiny as the measure of the constitutionality of the law, *id.* at 343, and said that it applies to any classification that "penalizes" the right to travel regardless of legislative intent or actual deterrence. *Id.* at 340-41.

The Court's focus on whether the law directly burdened, by penalizing, the right to interstate travel continued in *Memorial Hospital v. Maricopa County*. That case struck down a one-year waiting period requirement before new residents were eligible for state-paid indigent, nonemergency medical care. *Memorial Hospital*, 415 U.S. at 254. The Court held that the statute penalized the right to interstate travel because medical care is as much "'a basic necessity of life'" to an indigent as the welfare assistance that was at issue in *Shapiro*. *Id.* at 259. The Court found that the right of interstate travel must be seen as ensuring new residents the same right to vital government benefits and privileges in the states to which they migrate as are enjoyed by other residents. *Id.* at 261.

Memorial Hospital, 415 U.S. at 262 n.21, distinguishes *Dandridge* on the basis that the classification in *Dandridge* did not impinge upon a fundamental right. *See Graham v. Richardson*, 403 U.S. 365, 376 (1971). Yet, in *Memorial Hospital*, Justice Rehnquist pointed out the potential race to the bottom that could result as an unintended consequence of the Court's opinion. *Memorial Hospital*, 415 U.S. at 279 (Rehnquist, J., dissenting). *See also* Todd Zubler, *The Right to Migrate and Welfare Reform: Time for Shapiro v. Thompson to Take a Hike*, 31 Val. U. L. Rev. 905, 933-38 (1997) (logical result of *Shapiro* and its progeny is that each state will avoid having more generous benefits that any other state to avoid (1) being a welfare magnet and (2) running into constitutional problems created by *Shapiro*'s application of strict scrutiny to all disparities in benefits). Thus, on the one hand, the Court says it will resist the temptation to become a superlegislature and allow the states to make the public assistance decisions; while on the other hand, the *Shapiro* line of cases severely curtails the options available to the states. *Id.* at 287 (Rehnquist, J., dissenting).

In the above cases, the plaintiffs' right to travel was penalized because they were put in a worse position by application of the statutes at issue after they moved to their new states. Unlike *Shapiro* and its progeny, Section 11450.03 does not impose an absolute bar to the receipt of benefits by recent migrants. California has no waiting period to establish eligibility. New California residents are immediately eligible for benefits under the state's TANF program.

B. No Majority of This Court Has Invoked *Shapiro's* Strict Scrutiny Since *Memorial Hospital*

Shapiro and its progeny threatened catastrophic effects on the states' abilities to determine their own welfare policies. However, this Court has been distinguishing the *Shapiro* line of cases on a number of bases since 1975.

The first case to signal a relaxation of *Shapiro's* strict scrutiny is *Sosna v. Iowa*, where an Iowa statute requiring one year of continuous residence before filing a petition for divorce was upheld. *Sosna*, 419 U.S. at 395. Citing two factors, the Court distinguished *Shapiro*, *Dunn*, and *Memorial Hospital*. First, a delay in getting a divorce did not "irretrievably foreclose[]" anyone from ultimately obtaining it, unlike the prior cases where some benefits never would have been recovered. 419 U.S. at 406. Second, the state's residency requirement was not justified by mere budgetary considerations but by the state's need to control domestic relations, an area long regarded as being the exclusive province of the states. 419 U.S. at 404. Iowa's state interest was to ensure recognition of its divorce decrees by other states under the Full Faith and Credit Clause of the Constitution. This was considered a more potent state interest than fiscal matters. The Court upheld the statute without specifying a standard of review. The opinion balanced the state interest in favor of the statute against the burden on the right to travel, concluding that the former outweighed the latter. *Id.* at 406, 409-10. The Court emphasized that the gravamen of Sosna's claim was not a *total deprivation*, but only delay. *Id.* at 410.

Sosna threw considerable doubt on the viability of the *Shapiro* line of cases.[4] Justice Marshall, in dissent, said the majority opinion "departs sharply" from *Shapiro*, substituting an "ad hoc balancing test" for strict scrutiny. *Sosna*, 419 U.S. at 418-19 (Marshall, J., dissenting). Since *Sosna*, the Court has not used an "ad hoc balancing test" in right to travel cases. *See* Zubler, *The Right to Migrate*, 31 Val. U. L. Rev. at 905.

Zobel v. Williams, 457 U.S. 55, continued the shift away from *Shapiro's* analysis under the Equal Protection Clause of the Fourteenth Amendment. Some analysts suggest that it contorted

[4] *See also Vlandis v. Kline*, 412 U.S. 441, 452-54 (1973) (upholding waiting period to qualify for resident tuition at state universities).

the rational basis review in the process.[5] Applying neither the *Shapiro* strict scrutiny analysis nor the *Sosna* balancing test, *Zobel* invalidated Alaska's scheme that distributed oil revenues to residents based on how long they had lived in Alaska. The oil reserve dividend varied in amount based on the length of each citizens' residence. *Id.* at 57, 65. The Court did not find it necessary to apply strict equal protection scrutiny to determine whether the program penalized the exercise of the right to travel, instead holding that the benefit scheme did not pass the rational basis test. *Id.* at 60-61, 65.[6] The Court found that two of Alaska's legislative justifications were not rationally related to the distinctions made in the statute and that the third justification--rewarding citizens for past contributions--was not a legitimate state purpose. *Id.* at 62-65. The Court distinguished the *Shapiro* line of cases because the Alaska statute did not impose any threshold waiting period before receiving benefits; rather, it created "fixed, *permanent* distinctions" between all residents of Alaska, depending on how long they have been in the state. *Id.* at 59 (emphasis added).

Zobel is notable for Justice O'Connor's concurrence, which recognized that "[n]othing in the Equal Protection Clause itself . . . declares this objective [rewarding past citizen contributions] illegitimate." *Id.* at 73 (O'Connor, J., concurring). Instead, she

[5] Zubler, *The Right to Migrate*, 31 Val. U. L. Rev. at 906.

[6] Professor Tribe observes that the Court used an enhanced review that appears

> more the result of dissatisfaction with the existing tools of equal protection analysis for dealing with [discrimination against newcomers] than of any overall shift in the Court's scrutiny of how well various purposes fit legislatively chosen means.

Lawrence H. Tribe, *American Constitutional Law* § 16-2, at 1441-42 (2d ed. 1988).

suggested using a very different analysis based on the Privileges and Immunities Clause of Article IV of the Constitution. *Id.* at 74-78. She argued that a statute must satisfy a two-part test if it burdens a nonresident or new resident who seeks to engage in an essential activity or exercise a basic right. *Id.* at 76. First, there must be "'something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed.'" *Id.* (citation omitted). Second, the Court must find a substantial relationship between the evil and the discrimination practiced against the noncitizen. *Id.* Applying this test, Justice O'Connor found that the asserted "evil" of "partaking in current largesse without having made prior contributions" was not substantially related to the "cure" because some people who migrated to Alaska may have contributed significantly more to the state, both before and after their arrival, than have some of the natives. *Id.* at 77-78.

This Court's most recent right to migrate decision adds yet another dose of confusion to the case law. *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, elevates public employment to the same level as the "necessities of life" analyzed in *Shapiro* and *Memorial Hospital*. *Soto-Lopez* struck down a civil service employment preference for veterans who lived in New York when they entered the service. The case generated several opinions. Only four justices (Brennan, Marshall, Blackmun, and Powell) held that the right to travel was violated. The penalty analysis in *Soto-Lopez* concentrated on the fact that the immigrant veterans were *permanently* barred from receiving civil service bonus points. *Id.* at 909. The plurality opinion found a "guiding principle" to tie together the various analyses described above: the right to migrate protects residents of a state from being disadvantaged, or from being treated differently, simply because of the timing of their migration, from other similarly situated residents. *Id.* at 904. That said, however, the plurality promptly "inferred" a penalty on interstate migration and returned to strict scrutiny review. *Id.* at 908. Chief Justice

Burger and Justice White concurred, but only on the ground that New York's program failed *Zobel's* minimum rationality test.

Justices O'Connor, Rehnquist, and Stevens dissented, arguing (1) that New York's program passed equal protection rational basis scrutiny finding any impact on the right to travel to be "ephemeral," *id.* at 923-24 (O'Connor, J., dissenting), and (2) that the program's minimal effect on interstate migration was insufficient to invoke the higher scrutiny of the Privileges and Immunities Clause of Article IV. *Id.* at 920.

Unlike the plaintiffs in the above cases who were handicapped by the creation of permanent distinctions among residents and newcomers, in California, newcomers will continue to be *eligible* for TANF benefits. Section 11450.03 merely set the level of cash aid for those eligible to receive public welfare assistance.

C. Failure to Halt the Expansive *Shapiro* Doctrine Leads to the Creation of Ever More "Fundamental" Rights

As demonstrated by the case summaries above, the right to travel is a free floating doctrine. It encompasses more and more state activity until it so firmly ties the hands of the states that they are incapable of performing even the most fundamental budgetary functions.

The formulation of the right to travel doctrine that forbids any restriction on a "necessity of life" has already been stretched well beyond the basics. *Memorial Hospital* began this trend with its announcement that *nonemergency* medical care was a "necessity of life"; *Soto-Lopez* relaxed the "necessity of life" requirement for strict scrutiny to any "very important" benefit. *Soto-Lopez*, 476 U.S. at 907 (civil service examination bonus points). *See also Hassan v. East Hampton*, 500 F. Supp. 1034, 1041 (E.D.N.Y. 1980) (applying strict scrutiny to a one-year

waiting period to obtain commercial shellfish license applicable to only a portion of the available shellfishing lands).

Moreover, certain courts are no longer content to limit the "fundamental right" to travel to the context of interstate travel; now some courts (and commentators) argue that *Shapiro* requires application of strict scrutiny to *any* statute which may impede movement of any kind within a state. *See, e.g., Lutz v. City of New York*, 899 F.2d 255 (3d Cir. 1990) (cruising ordinance struck down); Andrew C. Porter, *Toward a Constitutional Analysis of the Right to Intrastate Travel*, 86 Nw. U. L. Rev. 820, 821 (1992) (arguing that fundamental right to interstate travel has as a necessary corollary the right to intrastate travel).

In the case at bar, respondents would have this Court expand the right to travel to include an obligation on the state to subsidize welfare recipients with the means to enjoy that right. They are arguing that California is constitutionally obligated to fund their move. As a general matter, a state is under no duty to subsidize the costs of the exercise of constitutional rights. In *Harris v. McRae*, 448 U.S. 297, 317-18 (1980), the Supreme Court held that a woman's freedom of choice does not carry with it a constitutional entitlement to the financial resources necessary to exercise that freedom. Here, California has not prohibited travel or placed a substantial obstacle in the way of a newcomer's move to California; it has simply decided not to increase the government aid above what a newcomer received, or would have received, in their state of prior residence, thereby declining to subsidize the newcomer's travel. The temporary, nondrastic restriction at issue in this case should *not* be subsumed into the amorphous (and expanding) "fundamental" right to travel.

IV

SECTION 11450.03 DOES NOT VIOLATE THE PRIVILEGES AND IMMUNITIES CLAUSE

Section 11450.03 does not violate the Privileges and Immunities Clause of either Article IV or the Fourteenth Amendment. This Court in *Zobel v. Williams*, 457 U.S. 55, ruled that the Privileges and Immunities Clause was not even implicated unless the regulation in question established a durational residency requirement as a condition of eligibility for some state program. *Zobel*, 457 U.S. at 58-59. That is not the case under Section 11450.03. There is no eligibility bar to recent migrants. Instead, recent arrivals are treated exactly the same as they were treated in their state of origin. For all practical purposes, the decision to migrate simply effects no change in the amount of welfare benefits to which interstate migrants may be entitled. Thus, under the analysis of the majority opinion in *Zobel*, this law does not violate the Privileges and Immunities Clause of the Constitution. Even under the alternate analysis employed by Justice O'Connor in her concurring opinion in *Zobel*, this law survives scrutiny.

Justice O'Connor's analysis did not rely on whether the measure imposed a durational residency requirement as a condition of eligibility. Instead, she would test all laws that distinguish between residents by the duration of their residency according to the test laid out in *Baldwin v. Montana Fish and Game Commission*, 436 U.S. 371 (1978). *Zobel*, 457 U.S. at 76 (O'Connor, J., concurring). The issue under that decision is whether the state is making an unnecessary distinction between residents and nonresidents who seek to "'engage in an essential activity or exercise a basic right.'" *Id.* (quoting *Baldwin*, 436 U.S. at 387). *Baldwin* does not list or describe the range of activities that may be "essential" or that involve a "basic right"

beyond noting that they are activities "sufficiently basic to the livelihood of the Nation." *Baldwin*, 436 U.S. at 388.

Such a right is not at stake in this controversy. This case does not concern the right to receive temporary assistance, rather only the amount of assistance that can be received. Receipt of the maximum grant possible is neither an essential activity nor a basic right. Nor does pursuit of the largest possible welfare payment affect the "livelihood of the Nation." California has crafted a regulation, consistent with congressional policy, to ensure that migrants to the state are treated no differently with regard to welfare grant levels than they were treated in their state of origin. This policy does not deprive migrants' basic rights. Instead it preserves the status quo. The Privileges and Immunities Clause is not violated by such a carefully crafted policy.

In California, newcomers will continue to be *eligible* for TANF benefits, restricted to the amount the newcomers would receive from their state of prior residence for 12 months. Section 11450.03 does not operate as a bar to the receipt of public welfare assistance. The proper analysis is under the rational basis analysis and the controlling precedent of *Dandridge*.

CONCLUSION

The Personal Responsibility and Work Opportunity Act of 1996 has essentially wiped the welfare slate clean. After more than 60 years of tinkering with a welfare system that has proven to be counterproductive and beyond repair, the states have been given the opportunity to experiment with fresh solutions. California's efforts to transform its broken welfare system included maintaining newcomers at the same amount of welfare benefits they were eligible to receive in their former state of residence for 12 months. In the interest of discouraging welfare

dependency states should be allowed to experiment with different benefit levels, while at the same time providing a safety net for residents without regard to the duration of their residence. For the reasons described above, the Ninth Circuit's decision should be reversed.

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Respectfully submitted,

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